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C O N F I D E N T I A L SECTION 01 OF 02 COLOMBO 001840

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DEPARTMENT FOR SA, SA/INS, PM/B, L, T, IO; NSC FOR E.
MILLARD

E.O. 12958: DECL: 10-03-2002

TAGS: [PREL](#) [PGOV](#) [CE](#)

SUBJECT: ICC Article 98 agreement: Sri Lanka update

Refs: Colombo 1814, and previous

(U) Classified by Ambassador E. Ashley Wills. Reasons
1.5 (b,d).

1. (U) This is an Action Request -- Please see Para 4.

2. (C) Foreign Secretary Rodrigo sent Mission a letter today containing a proposed alteration to the U.S. draft ICC Article 98 agreement. (Note: The text of the letter is contained in para 5 below; it is also being faxed to SA/INS.) The MFA proposes replacing the current para 5 of the U.S. draft with a new text. This text states, in part, that "(E)ach party will enter into immediate consultations in the event of any difficulties arising with regard to the interpretation or application of this agreement..."

3. (C) Mission's sense was that the GSL proposal effectively undermined the purpose of our original para 5 (which essentially commits the two parties to non-cooperation with the ICC). The Ambassador called Rodrigo and underscored that point. Rodrigo replied that he agreed that the MFA's draft was "a bit open-ended" and could use tightening. The MFA would welcome a counter-draft by the U.S. Asked for an explanation of the MFA's concerns, Rodrigo related that there were apprehensions that the U.S. draft of para 5 could be problematic for "a small guy," i.e., Sri Lanka. As written, the draft text could conceivably put the GSL in the position of violating a UNSC resolution, for example. Other countries, such as EU members, could then place pressure on the GSL, charging it with non-compliance with its international obligations. The Ambassador replied that he would send the MFA's proposal back to Washington for review, but he did not think the proposed alteration by the MFA was acceptable in that it seemed to envisage a fundamental change of direction from the original text. Rodrigo noted that MFA Legal Adviser Rohan Perera was in New York until October 12 and could be reached at the Sri Lankan Mission there for discussions on this issue.

4. (C) Action Request: Mission will continue to press the case for unaltered agreement to our original proposal with Minister Milinda Moragoda and other high-level GSL interlocutors. In the meantime, we would appreciate Washington's analysis of the MFA's proposal. We wonder, for example, whether it is possible for the U.S. to come up with any language that would meet MFA concerns that the draft as written potentially could put Sri Lanka at odds with the UN. Sri Lanka is a moderate-sized country, easily buffeted by international pressures, and its concerns are comprehensible in that light. That said, we do not know whether any alternate U.S. construction is feasible on this matter. We would also appreciate seeing the Para 5 equivalent signed with Romania and other countries if the U.S. has agreed to language different than the original U.S. draft. (Note: We do not recommend contacting Rohan Perera in New York; we think his work on this matter is probably over-complicating efforts to wrap up an agreement.) End Action Request.

5. (U) The text of the Foreign Secretary's letter follows:

Begin text:

Further to the discussion we have had on the above matter.

As you know, the matter was also taken up in New York last month with Ms. Christina Rocca, US Assistant Secretary of State, and in subsequent consultations in

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Washington between Minister Milinda Moragoda and Deputy Secretary of State Richard Armitage.

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The Ministry has since considered the matter further and

we would propose certain amendments to the text of the draft Agreement.

In paragraphs 1, 2, and 4 of the draft, we believe US interests, in ensuring non-surrender of its nationals to the ICC, are fully met. Reciprocally, paragraph 3 requires consent of the Government of Sri Lanka in the event of a Sri Lankan national being called upon to be surrendered to the Court.

However, with regard to paragraph 5, it is felt that the language could create difficulties for Sri Lanka considering the wide powers conferred on the Court under the ICC Statute even in respect of non-State parties to the Statute. It is therefore suggested that paragraph 5 in the US draft be replaced by the following which would bring in consultative/review procedures:

"Each party will enter into immediate consultations in the event of any difficulties arising with regard to the interpretation or application of this Agreement and where necessary Parties may review the provisions of the Agreement. If an understanding is reached on any matter relating to this Agreement, after such review, such understanding shall be confirmed through an exchange of diplomatic notes."

We would be happy to discuss the matter further with you here in Colombo, or arrangements could be made, since Legal Adviser Rohan Perera is currently in the US, for discussions to take place either in New York or Washington early next week.

End text.

16. (U) Minimize considered.

WILLS